Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06098/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 January 2019	**On 8 February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

IFEYINWA PATRICIA ONOCHIE
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr O Noor, counsel.
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by the appellant against the decision of the First-tier Tribunal dated 30 May 2018 dismissing her appeal against the respondent's decision of 24 April 2017 refusing her leave to remain as a spouse.

Background

2. The appellant is a citizen of Nigeria born on 25 April 1979. She first came to the UK on 22 November 2013 with entry clearance valid until 14 July 2016 as the spouse of

her husband and sponsor. On 11 July 2016 she applied for further leave to remain in that capacity. The respondent notified the appellant's solicitors on 21 July 2016 that when the application was received by the respondent it did not contain the passports or passport sized photographs. On 3 October 2017 the respondent wrote again confirming that there was no record of the passports being received. The appellant was notified on 7 November 2016 that her application was being treated as invalid as no photographs had been provided and no evidence submitted of an application for a new passport.

3. It was the contention of the appellant and the sponsor that the passports and photographs had been enclosed with the application form and other documents but had been lost on their way to the respondent. Both the appellant and the sponsor obtained replacement passports by the end of January/early February 2017 and on 20 April 2017 the appellant made a further application for leave to remain. Her application was refused as, by that stage, she had become an overstayer and was unable to meet the eligibility requirements of the Rules. Her application was therefore considered under paras EX.1. and 276ADE(1).

4. The respondent was not satisfied that there were insurmountable or very significant obstacles to family life continuing in Nigeria, there were no exceptional circumstances outside her control such that it would not be proportionate to require her to return there to make such an application and there were no exceptional circumstances meriting a grant of leave outside the Rules. Her application was accordingly refused.

The Hearing before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal the appellant and sponsor gave oral evidence adopting their witness statements including a joint statement produced at the hearing. It was their case that the passports had been sent with the application but enquiries with the Home Office and Royal Mail had revealed they had been lost on route. It was accepted that this was not a case where there were insurmountable or very significant obstacles for the purpose of EX.1. or para 276ADE(1)(vi) [19]. It was, however, argued that, save for the eligibility requirement, the appellant met requirements of the Rules and that the ensuing injustice suffered by her as a result the loss of the passports in the post, attributable to no fault on her part, amounted to exceptional circumstances such that the appellant's removal would be disproportionate.

6. The judge, however, was not satisfied that the passports were lost in circumstances beyond the appellant's control amounting to exceptional circumstances. His reasons are set out in [21] of the decision. The judge said there was no record of the theft or losses being reported to the Royal Mail, save for references in letters from the appellant's solicitors. There was a Metropolitan Police letter acknowledging the report of an unspecified crime but no record of what crime was reported and a letter from the Passport Office dated 24 November 2016, acknowledging that passports lost in the post had been returned to it by the Royal Mail but the judge commented that,

at its highest, that letter did not demonstrate that the passports were enclosed with the application for leave to remain. The judge referred to a document at A25, an envelope sent to the respondent which had been opened but the judge said that all it demonstrated was that that the letter had been opened at some point. He said that the weaknesses in the accounts provided by the appellant and the sponsor led him to conclude that this part of the case had not been established. He did not accept that there were exceptional circumstances beyond the control of the appellant such that the refusal of leave would itself amount to an exceptional circumstance [23].

7. In the alternative, the judge said that even if he was satisfied that the passports were lost in the post that would not aid the appellant because of the delay between the rejection of the July 2016 application and the eventual submission of the April 2017 application. The appellant had been informed on 21 July 2016 and 3 October 2016 that documents were missing. These letters indicated that she was provided with an opportunity of producing fresh photographs and proof that she and her husband had applied for new passports. However, there was no evidence of such alternative steps being taken until the further application. The judge found that there was no explanation for the delay in not submitting a further application until April 2017, when their new passports had been received in late January or early February 2017.

8. So far as the argument that the appellants would succeed an application for entry clearance and that the Rules had been met, the judge did not accept this submission. He rejected an argument that the fact the decision letter did not engage with the income requirements meant that the respondent was deemed to have accepted them [27]. In any event, the judge was not satisfied that, as at the date of hearing, the documentary evidence produced supported the submission that the appellant could meet the financial requirements of the Rules. The most recent material did not demonstrate that the minimum income requirement of £18,600 was met. The judge referred to the sponsor's most recent P60 for the tax year ending 5 April 2018 showing a total income for the tax year of £16,703. The payslip dated 7 March 2018 recorded a monthly gross payment of £1322.40 and over the course of a year that would show an annual income of under £16,000. He accepted that in April and May 2018 the sponsor appeared to be earning a higher amount which, if it continued, could exceed the minimum income requirement. He commented that it might be that, properly analysed by an entry clearance officer in due course, the sponsor's employment might meet the minimum income requirement but on the basis of the materials before him that was not a foregone conclusion and it would not be appropriate for the Tribunal to usurp the scrutiny role of the entry clearance officer by jumping to conclusions not supported by the evidence [28].

9. The judge went on to consider article 8. He accepted that the first four Razgar [2004] UKHL 27 criteria were met and that the remaining issue was whether the appellant's removal would be proportionate for the purposes of article 8. The judge set out the reasons against removal at [33] and those for allowing the appellant to remain at [34]. He concluded that the factors in favour of the appellant's removal outweighed those favouring her continued residence in the UK, commenting that there was a strong public interest in the maintenance of effective immigration controls, it was not clear

that the appellant would meet the requirements for entry clearance on the material before the Tribunal, the entry clearance process was intended to ensure proper scrutiny was conducted in situations such as the present and that to allow the appellant remain in these non-exceptional circumstances would undermine immigration control [35]. For these reasons the appeal was dismissed.

The Grounds and Submissions

10. The grounds argue that the judge erred in law firstly in his assessment of whether the passports were stolen and secondly in the way he dealt with the financial threshold in the Rules. Ground one at [5] of the grounds sets out the evidence supporting the contention that the passports and photographs were enclosed with the application but were stolen or otherwise lost before reaching the respondent. It is argued that the weight of evidence, taking into account the fact that the witness evidence was unchallenged, was such that it was Wednesbury unreasonable to conclude that the passport had not been lost in circumstances beyond the appellant's control.

11. This ground also refers to the delay between obtaining the new passports and submitting a further application and points to the evidence produced that the appellant's legal representative had a number of serious medical conditions. He was admitted to hospital on 15 January 2017 and was unable to make court appearances while recovering. It is also argued that the only reason the subsequent application was refused under the Rules was because it was made more than 14 days since her leave to remain had expired. As that was because the passports had been stolen in the post, there was an unduly harsh element in the case which warranted consideration under article 8 outside the Rules.

12. So far as the financial threshold is concerned the second ground argues that the starting point for an article 8 consideration should be whether the appellant met the Rules and that the relevant date should be the date of application. Under the Rules the appellant would need to submit payslips covering the six-month period prior to the date of application and the evidence showed that the sponsor's total income in the six months prior to the application was £12,944.5, which demonstrated that his earnings could meet the annual income requirement of £18,600.

13. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on the basis that it was arguable that the First-tier judge took an incorrect approach to the evidence about the loss of the passports in the post and to the financial evidence which was arguably capable of showing that the Rules were met at the date of the application/decision even if not by the date of hearing, those matters having the potential to be material in the article 8 assessment outside the Rules.

14. Mr Noor adopted his grounds in his submissions. He argued that the judge's approach to the circumstances in which the passports had been lost was flawed. The oral evidence had not been challenged and the documentary evidence provided

more than adequate confirmation of that evidence. The judge put the threshold too high when considering whether the account given by the appellant was true. If the passports had been stolen in the circumstances described by the appellant, it was clear that she was not to blame and that this was a very significant factor when considering the application outside the Rules. He referred to and relied on [33] of TZ (Pakistan) v Secretary of State [2018] EWCA Civ 1109 which held that the critical issue was whether the strength of public policy in immigration control was outweighed by the strength of the appellant's article 8 claim.

15. He submitted that it was in the present case by the circumstances in which the appellant had found herself following the loss of the passports. So far as the financial aspect of the Rules was concerned, Mr Noor argued that there was no clear discussion by the judge about what date should be applied and that he had erred by treating it as the date of the hearing when he should have been considering whether the Rules had been met at the date of application. He further submitted that the principles in Razgar had not been applied properly and that, in the circumstances of the appellant it must be disproportionate to require her to go back to Nigeria to make a further application.

16. Mr Lindsay submitted that the judge had reached findings properly open to him for the reasons given. To show irrationality in a finding of fact required a high threshold and he argued that the judge had given more than adequate reasons for his decision on whether the passports had been lost in the circumstances as described. It was for the judge to assess the evidence and the lack of something directly contradicting the account did not mean that he was bound to find that the account was true. In any event, he submitted that the judge had been entitled to take into account the delay between receiving the replacement passports and the further application. The fact remained that the appellant could not bring herself within the Rules and that when considering the application outside the Rules proper consideration had to be given to the respondent's policy as set out in the Rules. The judge been entitled to find that the appellant had failed to show that there were sufficiently exceptional circumstances to justify a grant of leave outside the Rules. He had carried out a full balancing exercise at [33]-[35] and had reached a decision properly open to him.

Consideration of the whether the First-tier Tribunal erred in law

17. I must consider whether the judge erred in law such that the decision should be set aside. The first issue is whether the judge erred in finding at [23] that the appellant had not discharged the onus of showing that the passports had been lost in the circumstances described. To a large extent, ground one is an attempt to re-argue an issue of fact. It was for the judge to decide what weight could properly be given to the oral evidence and whether and to what extent the documentary evidence provided support for that evidence.

18. It is correct that the oral evidence was unchallenged to the extent that the respondent was not represented at the hearing and there was no cross examination. However, the judge asked a number of questions by way of clarification at [18] including

whether there were any documents to show that the loss had been reported to the Royal Mail. It turned out that one of the letters relied on (at A47) was unconnected with the appeal and was irrelevant. The judge did not make an express finding on the credibility of the appellant and the sponsor's oral evidence, but he has fully set out his concerns about the evidence in [21]-[22] to explain why he found that the appellant had not discharged the onus of showing that the passports had been lost in the circumstances described.

19. Whilst another judge might have reached a different conclusion, that does mean that the judge erred in his assessment of this issue. When the evidence is looked at as a whole, I am not satisfied that the judge's finding of fact on this issue can be categorized as irrational or not properly open to him on the evidence.

20. In any event, the judge went on to consider matters in the alternative. He said that even if he was satisfied that the passports had been lost in the post as described, there was no adequate account for the delay between the rejection of the July 2016 application and the eventual submission of the April 2017 application. It is right to note, as the judge did, that the respondent did not immediately reject the July 2006 application but contacted the appellants representatives to inform them that documents were missing and the subsequent decision letter of 3 October 2016 indicates that the respondent gave the appellant a further month to rectify the defects. There is no evidence that the respondent was kept up-to-date with what was happening and, even on the appellant's account, they received the replacement passports in late January/early February 2017, but their application was not submitted until April 2017. The evidence at A22 that the appellant's representative was unwell does not provide any adequate basis for a satisfactory explanation for the delay. It is dated 9 February 2017 and simply refers to not being able to attend court.

21. The issue in the second ground relates to whether the appellant was able to meet the financial requirements of the Rules. There is no doubt that the correct date for assessing matters under article 8 is the date of hearing. The judge was fully entitled to look at that date to see whether the requirements of the Rules were met. The reasons the judge gave for finding that this was problematic as set out in [28] relating to the sponsor's most recent P60 and the evidence of variable income in the period March April and May 2018 were properly open to him. I accept that if it was shown that the appellant could meet the income requirements in accordance with the Rules as at the date of application that would be a relevant factor as part of the overall factual matrix in assessing proportionality, but it does not detract from the fact that article 8 must be assessed as at the date of hearing. For the reasons given by the judge, he was entitled not to accept the submission that entry clearance was a virtual certainty and to take the view that there was insufficient evidence to show that the application was bound to be successful.

22. The judge accepted that the first four tests in Razgar were met and that the issue was whether the appellant's removal would be proportionate. He set out his reasoning on both sides in [33] and [34]. This follows the guidance given by the Supreme Court in Agyarko (2017) UKSC 11 and repeated by the Court of Appeal in TZ (Pakistan) in

which the Court also confirmed that, when considering the application outside the Rules and in undertaking the evaluation of exceptional circumstances, a Tribunal must take into account as a factor the strength of the public policy on immigration control as reflected by the respondent's tests within the Rules and that the critical issue would be whether the strength of the public policy on immigration control was outweighed by the strength of the article 8 claim such that there was a positive obligation on the state to permit the applicant to remain. The Court also emphasised that the framework approach in Razgar was not to be taken as avoiding the need to undertake this critical balance.

23. I am satisfied that the judge reached a decision properly open to him on the issue of proportionality for the reasons he gave in [33]-[35]. There were no insurmountable obstacles to the appellant returning to Nigeria, whether with the sponsor or by herself to make an application for entry clearance. It was argued that the application was bound to succeed whereas, the judge, for reasons properly open to him, took the view that it was not clear cut. He was entitled to find that the strength of the public interest was not outweighed by the strength of the appellant's claim.

24. In summary, I am satisfied that the judge reached a decision properly open to him for the reasons he gave. The grounds do not satisfy me that he erred in law.

Decision

25. The First-tier Tribunal did not err in law and it follows that the decision to dismiss the appeal stands.

Signed: H J E Latter Dated: 22 January 2019

Deputy Upper Tribunal Judge Latter